U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 02 June 2003

CASE NO.: 2002-LHC-00884

In the Matter of:

EDWARD DIFIDELTO,
Claimant,

v.

DELAWARE RIVER STEVEDORES,
Employer,

and

LIBERTY MUTUAL INSURANCE CO.,
Carrier.

Appearances: David Linker, Esq. For Claimant
John Kawczynski, Esq. For Employer

Administrative Law Judge

DECISION AND ORDER
AWARDING BENEFITS

This is a claim for temporary total disability ("TTD") benefits under Section 8 of the Longshore and Harbor Workers' Compensation Act ("LHWCA"). 33 U.S.C. § 901 *et seq.*

A hearing was held before me on 18 July 2002 in Cherry Hill, New Jersey at which time the parties were given the opportunity to present evidence and make oral argument.[1]

[1]The transcript of the 18 July 2002 hearing will be cited as "Tr.–." Received into evidence at the time of the hearing were ten Administrative Law Judge Exhibits, marked as "ALJX1-ALJX10." (Tr. at 9-10.) During the 18 July 2002 hearing the parties agreed that they were going to submit 33 joint exhibits post-hearing. (Tr. at 10.) At the time of the hearing, however, the exhibits were not properly organized. (Id.) Ultimately the parties submitted, in addition to the exhibits noted at the time of the hearing, several post-hearing transcripts of expert testimony. (Tr.

Claimant filed a brief on the merits on 12 February 2003 and Employer filed its brief on 17 April 2003. The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

I. STIPULATIONS

The parties stipulate and I find as follows:

1. The accident occurred on 7 January 2000 at Employer's premises in Camden, New Jersey.
2. The description is a left foot injury (Employer contends that any other claimed injuries are not work-related).
3. The parties are subject to the LHWCA.
4. An employer/employee relationship existed at the time of the injury.
5. The injury arose within the course and scope of employment.
6. Employer was timely notified of the injury on 7 January 2000.
7. The Secretary of Labor ("Secretary") was timely notified of the injury on 10 January 2000.
8. The Notice of Controversion was filed on 19 November 2001.
9. Informal conferences were held on 20 December 2000 and 7 August 2001.
10. Disability resulted from the injury.
11. Medical benefits were paid under the LHWCA.
12. Employer paid TTD from 8 January 2000 to 19 November 2001 at $563.18 per week.
13. Claimant's average weekly wage ("AWW") is $844.77.

(Tr. at 6-7.)

II. ISSUES

I must determine the extent of Claimant's disability, if any, and whether, by failing to return three report of earnings requests ("LS-200s") to Employer, Claimant has forfeited entitlement to compensation from 7 January 2000 to 22 April 2002.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of Evidence

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at 11-15.) I count 34 exhibits *in toto*. I have marked and received joint exhibits one through thirty-four, "JX1-JX34," and I will refer to them as such. Joint Exhibit 32 is the testimony of Dr. Farber but there are two separate transcripts. I have therefore subdivided JX32 into JX32(a) and JX32(b).

Claimant and His Accident

Claimant testified at the 18 July 2002 hearing. (Tr. at 16-50.) He is a 54-year old longshoreman who completed the eighth grade and terminated his ninth grade education to attend welding school. (Tr. at 16-17.) He can read and write; however, he never received a high school diploma or his GED. (Tr. at 17.)

Prior to commencing his employment on the waterfront in 1997 and after finishing welding school, Claimant did odds and ends, welding and working for contractors. (Tr. at 17-18.) He joined the ILA-Local 1291 in March of 1998, and his duties as a longshoreman required that he participate in the loading and unloading of cargo. (Tr. at 18-19.) He continued in this capacity until his accident on 7 January 2000. (Tr. at 19.)

On 7 January 2000, he hurt himself while working at Employer's Camden, New Jersey marine terminal. (Tr. at 23.) At the time of the accident he was unloading cocoa beans, and in the course of unloading the beans he fell 11 feet striking his left foot. (Tr. at 23-25.) He testified that to brace himself for impact he stretched out his right arm. (Tr. at 25.) Following the accident, he experienced immediate pain in his left foot. (Tr. at 25.)

Claimant continued to experience pain in his left foot during the evening following the accident. (Tr. at 26-27.) On 8 January 2000, he went to the West Jersey Hospital emergency room ("ER") where the medical staff took X-rays, gave him an injection, and sent him home with medication. (Tr. at 28.) After leaving the ER, Claimant received a telephone call advising him that his foot was broken and that he should seek additional treatment. (Tr. at 28-29.)

Claimant sought treatment from Dr. D'Amore (Tr. at 29; JX28) and Dr. D'Amore referred Claimant to Dr. Goldstein (Tr. at 32). According to Claimant, his treatment with Dr. Goldstein did not help his pain and he therefore sought treatment with Dr. John Ridenour, a podiatrist. (Tr. at 32-34, 41.) He testified that he also sought treatment with Dr. Roger Farber, because he was suffering from low back pain and severe headaches. (Tr. at 33-34.) Dr. Farber eventually referred Claimant to Dr. Heppenstall for orthopedic management. (Tr. at 35-37.) Dr. Heppenstall had performed surgery on Claimant's right knee in 1999. (Tr. at 36.)

According to Claimant, he has been unable to perform his work duties since the 7 January 2000 accident. (Tr. at 37.) He suffers from pain in his left foot, headaches, and lower extremity pain. (Tr. at 33-35.)

With respect to the surveillance video, Claimant testified that it shows him at Executive Auto Salon in Philadelphia. (Tr. at 38.) According to Claimant, he never performed any services for pay at that business. (Tr. at 38-39.)

Medical Evidence

The record contains medical opinions from the following 12 doctors: Dr. Roger E. Farber, Dr. Gary Goldstein, Dr. R. Bruce Heppenstall, Dr. Jeffrey Daniels, Dr. I. Howard Levin, Dr. Kevin D. Roberts, Dr. Bong S. Lee, Dr. Wilhelmina C. Korevaar, Dr. Enyi Okereke, Dr. John W. Ridenour, Dr. Edward L. Chairman, and Dr. James D'Amore. Each doctor's opinion and his or her involvement with Claimant's treatment will be addressed in turn.

1. Dr. Roger E. Farber

Dr. Farber (Board-certified neurologist) treated Claimant both before and after the 7 January 2000 work accident. The parties submitted a pre-accident clinical evaluation note dated 26 July 1999 (JX11) and numerous post-accident clinical evaluation notes commencing on 14 January 2000 and ceasing on 22 August 2002 (JX12). The pre-accident note reports Claimant's headache problems and pain "always in the right occipital region." (JX11.) The doctor treated this with a "[b]lock." (Id.) The post-accident notes document, *inter alia*, the 7 January 2000 accident, a left ankle fracture (cuboid fracture), significant cervical headaches, several block treatments, MRIs, neck pain, lumbar radiculopathy, and pain in the back and down the leg. (JX12.) In the 9 July 2001 note the doctor states that Claimant may have to adjust to life with the left foot trouble and become involved in sedentary work. (Id.) The notes following the 9 July 2001 note continue to convey a grim prognosis with respect to Claimant's left foot fracture, his back, and his right knee. (Id.) By 7 August 2001, the doctor is convinced that Claimant is unlikely to ever be able to do the heavy work he did as a longshoreman. (Id.)

Dr. Farber gave testimony over the course of two days: 9 September 2002 and 16 December 2002. (JX32(a), JX32(b).)[2] During his testimony, the doctor repeated much of what was well-documented in his evaluation notes, but he also elucidated several points.

He testified that he noted marked tenderness over Claimant's occipital nerve and that he diagnosed "occipital neuritis or greater occipital nerve headaches." (JX32(a) at 9-10.) He testified that his treatment of Claimant included several nerve block injections administered over the course of the past two years. (Id. at 10-15.) He testified that he last saw the Claimant on 30 August 2002, close to the time that Claimant was getting surgery to fuse bones in his left foot. (Id. at 18.) Based on his treatment, the doctor made the following diagnoses: occipital nerve headaches preexisting but aggravated by the fall, fracture and pain in the left foot, herniated lumbar disc from the fall. (Id. at 19-20.) The doctor opined that Claimant was totally disabled from longshore work, because of the pain, the fracture in his left foot, the right knee problems, and the low back problems. (Id. at 22-23.)

[2] In a somewhat unorthodox way of taking testimony, Claimant's counsel conducted direct examination on one day without Employer's counsel present but with his consent, and Employer's counsel cross-examined the doctor on a second day with Claimant's counsel present. Because there are two separate transcripts for the two days, I have divided the testimony into two separate exhibits, JX32(a) (the doctor's direct testimony) and JX32(b) (cross-examination of the doctor).

Lastly, the doctor opined that Claimant had not reached maximum medical improvement ("MMI"). (Id. at 24-25.)

Notwithstanding the doctors diagnoses and opinions, he thought that Claimant could do sedantary work provided he could move around. (JX32(a) at 23.) When asked what still disables Claimant from work, he stated that it was the frequent office visits and the foot problem. (JX32(b) at 13-14.) When questioned about how the surveillance videos influenced his opinion, he testified that they did not change his opinion. (Id. at 19.) As for the nerve block injections, he testified that he administers those depending on the kind of headache afflicting a patient. (Id. at 27.)

2. Dr. Gary Goldstein

Dr. Goldstein (Orthopaedic surgeon) treated Claimant's foot between 13 January 2000 and 13 April 2000. (JX13.) During the initial consultation on 13 January 2000, he diagnosed a non-displaced left cuboid fracture, post-traumatic cephalgia, impingement syndrome (right shoulder), and cervical sprain/strain syndrome. (Id.) He recommended immobilizing Claimant's left foot. (Id.) At the 19 January 2000 follow-up, the doctor noted that the foot is still a major problem and that Claimant is having trouble bearing weight. (Id.) The doctor placed a molded fiberglass cast on Claimant's foot. (Id.) In subsequent follow-up examinations the doctor reported continuing pain in Claimant's foot, right shoulder, and low back. (Id.) By the 28 March 2000 follow-up, the Claimant was ambulatory and had begun physical therapy ("PT"). (Id.) However, in later reports, the doctor continued to report Claimant's ongoing complaints of pain in his foot, shoulder, and back. (Id.)

3. Dr. R. Bruce Heppenstall

On 10 April 2002, Dr. Heppenstall (Orthopaedic surgeon) examined Claimant in consultation with Dr. Farber. (JX16.) On examination, and having considered Claimant's prolonged course of treatment, X-ray from 31 July 2000, and EMG of 10 May 2000, he diagnosed "traumatic fracture of the cuboid and degenerative arthritis of the cuboid, cuneiform and base of the metatarsal joints." (Id.) At this initial consultation he noted, "this patient may well benefit from an operative approach of removing the fragment from the cuboid and fusing the base of the third, fourth and fifth metatarsals." (Id.)

In his 24 April 2000 report of examination, the doctor noted having reviewed a 19 April 2002 MRI scan of Claimant's right knee, which revealed a torn medial meniscus and cartilage thinning. (JX16.) The doctor reported that this would require surgical arthroscopy of the right knee which he scheduled for 8 May 2002. (Id.) A 8 May 2002 operative report indicates that Claimant underwent the procedure. (Id.)

In a 21 May 2002 note, the doctor reported that Claimant is definitely improved, his discomfort has resolved, and he is walking with a greatly improved gait. (JX16.) The doctor noted, however, "he will require surgery on his foot as outlined previously and he is still having problems with a herniated L5 disc." (Id.)

In a 25 June 2002 report the doctor noted that the knee is progressing well but that the foot would still require surgery. (JX16.) In the doctor's final report of 25 July 2002 he states that Claimant's foot problem is the most outstanding and will require mid foot fusion which the doctor scheduled for 9 September 2002. (Id.)

4. Dr. Jeffrey Daniels

Dr. Daniels (Orthopaedic surgeon) prepared a report of examination dated 26 March 2001. (JX17.) At that time, he noted that the Claimant was complaining of pain and cracking in his right knee. (Id.) He also noted Claimant's left foot injury, which was causing Claimant to put more stress on his right knee. (Id.) The doctor performed a physical examination, examined a 26 March 2001 X-ray, and diagnosed "mild DJD [degenerative joint disease], right knee." (Id.) He reported that his "permanency rating would be 4% of the whole person." (Id.)

5. Dr. I. Howard Levin

Dr. Levin (Neurologist) prepared a report of examination dated 6 July 2000. (JX18.) The doctor recorded Claimant's current complaints, his past medical history, the results of a neurologic examination, and the results of various X-rays and MRIs. (Id.) He opined that there is no objective evidence to suggest Claimant is suffering from any ongoing neurologic impairment as a result of the 7 January 2000 incident. (Id.) The doctor further opined that Dr. Farber's headache care was highly inappropriate. (Id.) He opined that the Percocet had been detrimental, that Dr. Farber's repeated injections were unjustified, and that Dr. Farber's rationale for suggesting that Claimant was suffering from a lumbar radiculopathy was suspect. (Id.) Dr. Levin found no evidence of lumbar radiculopathy and reported that Dr. Farber's notes did not record any signs or symptoms of lumbar radiculopathy. (Id.)

He ultimately opined that Claimant's right leg and right knee problems were the result of an earlier work injury. (JX18.) In the plan section of his report, Dr. Levin opined that Claimant does not need further treatment for a 7 January 2000 incident and that from a neurological standpoint Claimant could return to work on a full-time basis. (Id.) Dr. Levin did suggest, however, that records from the orthopedic specialists be reviewed to see if there are any orthopedic limitations. (Id.)

6. Dr. Kevin D. Roberts

Dr. Roberts (Board-certified in podiatric surgery and foot and ankle surgery) performed independent medical evaluations of Claimant, and prepared reports dated 11 July 2000, 23 February 2001, 10 July 2001, and 6 September 2001. (JX19.) He also gave testimony on 14 October 2002. (JX31.)

Dr. Robert's 11 July 2000 report recorded the history of Claimant's accident, Claimant's past medical history, the results of a physical exam, and the results of X-rays taken at the time of the 11 July 2000 evaluation. (JX19.) He diagnosed the following: healed calcaneal fracture with mild

degenerative changes in the cuboid fourth and fifth metatarsal articulation, continuing neuropraxia of the left intermediate peroneal dorsal cutaneous nerve, and atrophy of plantar flexors of his left lower extremity secondary to long-term casting and chronic limping gait. (Id.) He opined that Claimant's prognosis is good but that he is at risk for developing "posttraumatic arthritis in his . . . cuboid joint." (Id.) He opined that Claimant "should actively participate in a work-hardening program" and "anticipated return to full employment . . . approximately two to three weeks after entering in a work-hardening program." (Id.) "At this point," the doctor noted, "he has reached maximum medical improvement of his cuboid fracture," but "has not reached 100% improvement secondary to his neuropraxia/nerve entrapment." (Id.)

In his 23 February 2001 report, Dr. Roberts reported that Claimant is totally healed from his calcaneal cuboid joint fracture and that his previous neuropraxia appeared to resolve with no clinical signs. (JX19.) The doctor opined that Claimant reached MMI with respect to the cuboid fracture and the neuropraxia. (Id.) "There is no reason, podiatrically," the doctor reported, "why he could not return to a work-hardening program full time from this standpoint and eventually move to active gameful employment as a long shoreman." (Id.)

Dr. Roberts reviewed additional reports, a bone scan, X-ray reports, and X-ray film before conducting an additional exam on 10 July 2001. (JX19.) In the 10 July 2001 report of examination he opined that Claimant had reached MMI with respect to his left foot and has no continuation of his neuropraxia. (Id.) He reported degenerative joint disease in Claimant's left foot relative to his previous trauma in this area. (Id.) Again, Dr. Roberts reported that Claimant should be able to return to longshore work after the work hardening program. (Id.)

In his 6 September 2001 report, based on a 10 July 2001 evaluation, the doctor rendered a permanent impairment rating. Using the AMA Guides, Dr. Roberts opined that Claimant has a 4% whole body rating, a 10% lower extremity rating, and a 14% foot rating. (Id.)

In his 14 October 2002 deposition, Dr. Roberts clarified the information and opinions contained in his various reports. (JX31.) He explained neuropraxia,

> It's kind of like an injury of a nerve of a stretching, like, someone that's chronically hit their funny bone. It's like spraining your nerve would probably be the best thing, where the nerve isn't actually cut or lacerated. It's just been stretched or damaged. And usually it resolves itself.

(JX31 at 10-11.) He testified that during the 23 January 2001 exam the pain had resolved. (JX31 at 12-13.) He explained why he felt that Dr. Farber's injections were excessive. (JX31 at 13-14.) Upon reviewing JX1-JX29, the doctor testified that a 16 September 2002 CT scan showed no sign of fracture of the cuboid and that Claimant suffered from post traumatic arthritic changes in his cuboid fourth and fifth metatarsal phalangeal joints. (JX31 at 17-18.) He further testified that an arthrodesis or a fusion of the joint is the correct procedure, notwithstanding what Dr. Heppenstall

had said in a 17 September 2002 report.[3] (JX31 at 18-20.) Upon reviewing the jobs the vocational expert identified, the doctor approved all of them. (JX31 at 20-21.) Besides the fusion, he opined that Claimant did not need any other treatment except maybe anti-inflammatory medication. (JX31 at 21-22.) Upon reviewing the surveillance videos, the doctor "saw no reason why [the Claimant] wouldn't be able to return to work where he needs to ambulate and stand for an extended period of time." (JX31 at 23.)

On cross-examination, Dr. Roberts admitted that during certain segments of the surveillance video, when the camera was not running, Claimant could have sat down. (JX31 at 23-24.) He further testified that arthritis can cause pain and that there was no indication of pain in the cuboid area prior to the injury. (JX31 at 29-30.) He also testified that longshore work would put greater stress on the foot than a sedantary position would. (JX31 at 30.) He clarified his testimony concerning the propriety of the fusion procedure Dr. Ridenour recommended, stating as follows:

> I don't think it's inappropriate. I just wouldn't agree with it for treating these joints. These joints that we're talking about have very little movement in a person without arthritis. And to go in and perform what's basically considered an arthroplasty or clean up procedure usually offers the patient little relief. And you're trying to salvage minimal motion that isn't required for normal ambulation.

(JX31 at 35-36.) To summarize, he did not think the fusion was inappropriate, he just opined that the procedure is probably not going to give Claimant much relief. (JX31 at 36.)

7. Dr. Bong S. Lee

Dr. Lee (Orthopedic surgeon) prepared a report of examination dated 4 September 2001. (JX21.) Dr. Lee reported Claimant's history, noted his current complaints, and conducted a physical examination. (Id.) He also reviewed X-rays, a bone scan, and various medical records. (Id.) Dr.

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[3]Attached to the transcript of Dr. Robert's testimony was, not only his CV and three of Dr. Farber's evaluation notes, but also a heretofore unseen report of Dr. Heppenstall dated 17 September 2002, page three of Dr. Heppenstall's 10 April 2000 report, and a 16 September 2002 diagnostic report from South Jersey Radiology Associates. Dr. Roberts gave testimony concerning Dr. Heppenstall's 17 September 2002 report. (JX31 at 18-20.) Employer's counsel asked Dr. Roberts "[w]hat's your understanding of what Doctor Heppenstall's impression was after reviewing the CT?" (JX31 at 18.) Dr. Heppenstall's 17 September 2002 report is not a part of the current record. It was only through a combination of my own confusion and divine intervention that I discovered that an additional report from Dr. Heppenstall was attached to a deposition of Dr. Roberts and not included with Dr. Heppenstall's other reports. I will therefore only consider Dr. Robert's independent opinion and not Dr. Robert's "understanding of what Doctor Heppenstall's impression was after reviewing the CT." (JX31 at 18.) For completeness sake, I have attached page three of Dr. Heppenstall's 10 April 2000 report, included with Dr. Robert's testimony, to JX16.

Lee opined that Claimant had several conditions resulting from the 7 January 2000 injury but that "the only residual condition from the injuries … is the symptomatology of the low back, which was triggered by the incident." (Id.) The doctor noted, "[h]e may require further treatment for this low back condition." (Id.) "Because of the low back condition," the doctor opined "he may be partially disabled for certain activities such as repetitive bending of the back, lifting no more than 25lbs, and long standing and walking especially on stairs." (Id.) The doctor noted, however, "[h]e can certainly return to a modified job within these restrictions at this time." (Id.)

8. Dr. Wilhelmina C. Korevaar

Dr. Korevaar (Board-certified in anesthesiology and pain management) prepared a report of examination dated 15 January 2002 (JX22) and gave testimony on 7 October 2002 (JX30).

The doctor's report states that everything bothers Claimant. (JX22.) She recorded Claimant's medical history, his 26 March 1999 work related injury to his right knee, the surgery following, and Claimant's then current daily activities. (Id.) In the history section of her report, she noted that Claimant brought with him to the examination an unrestricted automobile/boat license issued on 5 June 2001 and a "To-Do" list. (Id.) The doctor conducted a physical examination and reviewed multiple records. (Id.) Based on the history, exam, and record review, she concluded that Claimant has fully and completely recovered from his 7 January 2000 injury. (Id.) She explained that Claimant currently leads an active lifestyle and can return to his pre-injury position as a longshoreman without restrictions. (Id.)

On 7 October 2002, Dr. Korevaar elaborated on her report, testifying that she examined Claimant to see whether "he had residua of an injury that happened at work on Janaury 7, 2000." (JX30 at 12-13.) She stated her opinion that Claimant had strained and sprained his left foot on 7 January 2000 and restated her opinion that Claimant had fully and completely recovered from any and all injuries sustained on 7 January 2000. (JX30 at 24-27.) She also restated that Claimant could return to his longshore work. (JX30 at 27.)

In preparation for her testimony, Dr. Korevaar reviewed the following additional evidence: a 6 July 2002 X-ray of Claimant's left foot positive for degenerative arthritis but negative for fractures, a 13 September 2002 CT scan of the left foot showing a healed fracture of the distal cuboid, and Dr. Heppenstall's 25 July and 17 September 2002 reports. (JX30 at 28-29.) Based on her review of those documents, she opined that surgery on Claimant's foot was unnecessary and that "the cuboid bone is healed from fracture." (JX30 at 28-30.) She also stated that under the AMA Guides she would assign no permanency rating to Claimant, because there was no radiographic evidence that Claimant sustained anything other than contusions or a sprain injury. (JX30 at 30-31.)

What the radiographic evidence did suggest, Dr. Korevaar testified, was a normal course of arthritic changes already present at the time of injury. (JX30 at 30-31.) She opined that the injury did not accelerate or aggravate the arthritic changes, because there was no radiographic evidence to

suggest that conclusion. (JX30 at 31-32.) Moreover, she noted, the arthritic changes are consistent with weight-bearing activities. (JX30 at 32.) She opined, based on her 15 January 2002 exam, that Claimant does not need any ongoing treatment. (Id.) The surveillance tapes did not change any of her opinions. (JX30 at 33.) On cross-examination, she testified that she did not review any of the X-ray or MRI films she mentioned. (JX30 at 35.)

9. Dr. Enyi Okereke

Dr. Okereke (Orthopaedic surgeon) prepared a report of examination dated 9 June 2000 and a follow-up report dated 17 January 2001. (JX23.) In the first report, Dr. Okereke recorded Claimant's past medical, surgical, and social histories. (Id.) The doctor reported a review of systems, results of a physical examination, and review of X-rays of the forefoot including the cuboid bone. (Id.) Based on this, the doctor diagnosed a left foot contusion and a "[h]istory of cuboid fracture, left foot, healed." (Id.) In the comment section of the report, the doctor stated that gradual resolution of the Claimant's swelling and pain is expected over time (two to three months) and that no formal intervention is needed. (Id.) The doctor further opined that physical therapy will only exacerbate symptoms and that "[s]ubjective decrease in light touch sensation may be due to neuropraxia of the superficial peroneal nerve branch, which warrants no intervention." (Id.) The neuropraxia, the doctor reported, "should also resolve over time." (Id.)

In the 17 January 2001 report, Dr. Okereke noted global pain about the left foot and black and blue discoloration to the foot. (JX23.) The doctor reported that the pain is the same as it was on 9 June 2000 and that Claimant went back to work but could not tolerate it. (Id.) The doctor reported, "[t]he examination was brief, but shows a normal appearing foot with a slight bunion deformity." (Id.) The doctor opined:

> The patient's level of pain and location of pain, which was the lateral, medial hindfoot and forefoot are incongruent with the mechanism of his injury or the paucity of findings on this examination. I am unable to help him and have referred him to other physicians in town such as Keith Wapner, MD and Paul Hect, MD.

(Id.)

10. Dr. John W. Ridenour

Dr. Ridenour (Board-certified podiatrist) treated Claimant and prepared reports dated 3 August 2000, 17 November 2000, 12 December 2000, 21 May 2001, 4 August 2001, 13 September 2001, and 16 December 2002. (JX24.) He also gave testimony on 13 September 2002. (JX34.)

In his 3 August 2000 report, Dr. Ridenour reports that Claimant's primary doctor, Dr. D'Amore, referred Claimant to him. (JX24.) He reports that he first saw Claimant for physical therapy on the left foot on 28 April 2000 and that he feels that Claimant is disabled with the length of time not determined. (Id.) In his 17 November 2000 report the doctor notes that Claimant has

not responded well to therapy and that he is "disabled." (Id.) He further notes, "to resume the type of work that he does would only put the patient in an injurious state." (Id.) In a 12 December 2000 report, the doctor notes, "I have seen [Claimant] on November 17, 2000, December 1, 2000, and December 8, 2000 and still there is no improvement." (Id.) Again, he reports that Claimant is disabled. (Id.) In the doctor's 21 May 2001 report, he reports weekly visits, a fractured and deformed cuboid bone, and his opinion that Claimant "could not possibly do a regime at a work hardening program." (Id.) In his 4 August 2001 report, the doctor records "delayed healing fracture of his left cuboid bone." (Id.) The doctor recommends "permanent disability." (Id.) In his 13 September 2001 report, the doctor reports "encouraging news": "[t]he most recent x-rays taken 8/31/01 revealed that there is significant healing of the cuboid fracture primarily due to the EBI bone stimulator that he is using every day." (Id.) In the 16 December 2002 report the doctor reports that Claimant "is disabled and probably will not recover fully to the extent where he would be able to resume the activity that he did prior to the injury to the foot, i.e., working at the job that he had before." (Id.)

Dr. Ridenour elaborated on his treatment of Claimant in testimony taken 13 September 2002. (JX34.) He testified that his preliminary diagnosis was a broken left foot. (JX34 at 14.) The doctor noted that the treatment he provided over the past year included physical therapy, an air cast, bone stimulator, cortisone injections, and exercise, but that it did not progress well. (JX34 at 16.) Based on the history Claimant gave and his review of various reports, the doctor opined that there was a causal relationship between the January 2000 injury and the broken left foot. (JX34 at 19-20.) The doctor opined that while under his care, Claimant would not have been able to do the heavy lifting and the physical exertion that longshore work demands. (JX34 at 20-21.) In addition, the doctor reviewed the surveillance reports which did not change his opinion with respect to Claimant's ability to do longshore work. (JX34 at 21-22.)

11. Dr. Edward L. Chairman

Dr. Chairman (Board-certified podiatrist) prepared reports dated 11 October 2001 and 7 November 2001 (JX25) and gave testimony on 10 September 2002 (JX33). In his 11 October 2001 report he recorded Claimant's complaints of left foot pain and the fact that Claimant reported the onset of the pain as 7 January 2000. (JX25.) He recorded Claimant's course of treatment, the results of a 14 May 2001 bone scan, and the result of X-rays from 31 July 2001. (Id.) He opined that the degenerative joint disease "was there prior to this injury." (Id.) He noted, "[t]he pain on palpation of the 3rd interspace definitely correlates to the neurological findings of damage to the superficial peroneal nerve." (Id.) He reported,

> While pain is often measured in subjective terms, I can tell you that after careful palpation of the various joints of the left foot (33 in total) that this patient does have pain and discomfort which corresponds to the Bone Scan and x-ray findings and the nerve conduction study. The pain is significant on palpation and often when I went back to palpate the area while directing the patient's attentions elsewhere, I was able to elicit the same degree of pain.

(Id.) The doctor then opined "that the symptomatology of this foot would not significantly change unless a more radical approach is taken with the 4th and 5th metatarsal cuboid joints and the cuboid lateral cuneiform juncture." (Id.) He recommended that certain joints be fused with the possibility of a bone graft but warned Claimant, "there is no way than [sic] one can warranty the diminishing or riddance of the current pain that he is experiencing." (Id.) He noted, "[e]ven if this procedure was successful, it would leave him partially impaired to some degree." (Id.) He also recommended "a neurolysis of the superficial peroneal … with possibly the removal of a section of the peroneal nerve leaving the area of burning and pain without sensation and with a numb feeling." (Id.)

In his 7 November 2001 report, Dr. Chairman reported reviewing X-rays dated 18 October 2001 taken at the South Jersey Radiology Associates. (JX25.) Having reviewed the X-rays, he noted "an obvious continuation of a Fx of the left cuboid at the juncture of the cuboid 4th metatarsal joint and an even clearer indication of traumatic arthritic changes at the lateral cuneiform-3rd metatarsal joint." (Id.) He reported, "[t]he cartilage is completely eroded in this joint and there is traumatic arthritis involving the whole joint." (Id.) Ultimately, the X-rays did not change the doctor's opinion expressed in the report of 11 October 2001. (Id.)

Dr. Chairman elaborated on his reports in testimony taken on 10 September 2002. (JX33.) He testified that he reviewed X-rays from South Jersey Radiology, a bone scan, and a nerve conduction study and that Claimant's complaints correlated to the diagnostic studies. (JX33 at 14-15.) He testified that he diagnosed traumatic arthritis of the tarsal metatarsal joints and neuritis or a nerve injury to the superficial peroneal nerve. (JX33 at 16-17.) He opined that there was a correlation between the 7 January 2000 injury and his diagnosis. (JX33 at 17.) The basis for his opinion was the time line, Claimant's history, and the testing. (Id.) With respect to Claimant's ability to do longshore work, the doctor opined that based on his 33 years of medical experience, Claimant would be impaired in performing his job. (JX33 at 18.) When questioned about the surgical procedure that Dr. Heppenstall performed the day before Dr. Chairman's testimony, Dr. Chairman testified that it is the same procedure he recommended in his report. (JX33 at 19.)

12. Dr. James D'Amore

Dr. D'Amore prepared a report dated 28 March 2000 and another handwritten report dated 31 July 2000. (JX28.) In the 28 March report he indicated that he was treating Claimant for his 7 January 2000 work related injuries. (Id.) He reported that Claimant "noted the immediate onset of pain in the left foot, right shoulder, head, neck, and low back regions." (Id.) With respect to Claimant's "current limitations and progress," he reported "no significant progress made since his initial evaluation" and that Claimant "must not be placed in a weight-bearing situation." (Id.)

In his handwritten report of 31 July 2000, he reported that Claimant "is not improved." (JX28.) He opined that Claimant "has suffered a permanent injury to his left foot and is disabled as such from any weight bearing employment or from a return to his former position." (Id.) Attached to the report was a 23 May 2000 work capacity evaluation signed by Dr. D'Amore, which contained

the handwritten comment "cannot work!!" (Id.) It also limited Claimant from sitting, walking, standing, and reaching. (Id.)

Vocational Evidence

Jeannine M. Salek's (Vocational expert) 19 April 2002 progress report identified positions of suitable alternate employment ("SAE"). (JX27.) She stated that Claimant "has been released to medium level work by Dr. Roberts as of July 10, 2001." (Id.) She noted, "[a]ccording to the Physical Capabilities Checklist completed by Dr. Roberts, [Claimant] is able to stand, 3 to 5 hours out of an 8 hour day; walk, 3 to 5 hours per 8 hour day; and sit up to 8 hours per day." (Id.) "[M]indful of his educational and work history and … functional capacities as outlined by Dr. Roberts," she identified the following positions of SAE and provided the following descriptions:

1. Driver/Courier for CD&L ($6.50/hour) (light)
2. Check Cashier for United Check Cashing ($8.00/hour) (light)
3. Cashier/Valet for Parkway Parking Corporation ($6.50/hour) (light)
4. Driver/Valet for Mile High Valet ($7.00/hour) (light)
5. Product Management Assistant/Driver for American Red Cross ($12.80/hour) (medium)
6. Unarmed Security Officers for Burns-Pinkerton Security ($7.50-$8.50/hour) (light) - "[j]ob duties involve: Assignment to contract locations which may require security desk assignments, patrolling by vehicle, gate security, and foot patrol dependent on site assignment. Officers monitor entrances and exits of visitors; alert police and security and facility management of security infractions and safety violations and emergency situations."
7. Janitor for YCS Sawtelle South ($9.00/hour) (medium) - "job involves cleaning and light maintenance and custodial work for office environment. Generally lifting would be limited to 20 to 25 pounds but may occasionally lift up to 50 pounds if moving office machines or equipment, which is seldom."
8. Cashier for Port Authority City of Camden ($8.05/hour) (sedentary) - "position involves sitting in parking lot booth, collecting parking tickets and payments for parking."

(Id.)

Surveillance Evidence/Records from Executive Auto Salon/LS-200s

By subpoena dated 11 March 2002 Employer sought to have Executive Auto Salon produce any and all personnel records documenting Claimant's employment with that business. (JX5.) By letter dated 2 April 2002, Christopher Toriello responded to the subpoena, stating that the business did not employ Claimant but that he, Mr. Toriello, knew Claimant on a personal level. (JX6.)

Employer submitted two surveillance tapes, which recorded Claimant's activities on 14 and 15 February 2001 and 21, 22, 29, and 30 January 2002. (JX29.) I have reviewed both tapes *in camera*.

Also submitted with the surveillance videos was an investigative summary from International Claims Specialists. (JX29.) The summary reports the dates and running time of the surveillance videos and also provides a detailed summary of the surveillance. (Id.) The investigator reports that "[C]laimant is performing work activities as a supervisor of an auto detail shop out of a garage facility at Park Town Place, Ben Franklin Parkway, Philadelphia, PA." (Id.) The report states that Claimant "opens the shop up in the morning, oversees employees who detail the cars, he then inspects the work, answers the phone, and conducts business inside the shop." (Id.) The report states that one of the investigators spoke to Claimant over the phone at the publicly listed number for the business and that Claimant stated that the business was open six days a week. (Id.) Claimant also provided the hours of operation and the prices for car detailing over the phone. (Id.)

Lastly, Employer sent Claimant's attorney three LS-200 forms (Report of Earnings Statements) on 25 January 2002, 21 February 2002, and 22 April 2002. (JX8.) Two sought Claimant's earnings between the period 7 January 2000 and 21 January 2002. (Id.) The last sought Claimant's earning between 7 January 2000 and 22 April 2002. (Id.)

B. Discussion

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiner. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atl. Marine, Inc. And Hartford Accident & Indem. Co. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).

It has been consistently held that the LHWCA must be construed liberally in favor of the claimant. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies that the proponent of a rule or position has the burden of proof. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), *aff'g* 990 F.2d 730 (3d Cir. 1993).

1. Extent of Claimant's Disability

The parties stipulated that Claimant suffered a left foot injury on 7 January 2000 at Employer's premises. However, the burden of proving the nature and extent of his disability rests with the Claimant. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the LHWCA as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of Am.*, 25 B.R.B.S. 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Here, Claimant does not seek a permanent award. (Claimant's Brief, p. 1, 17.)[4] Therefore, I need not resolve any dispute over the nature of Claimant's disability, only the extent of it.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *E. S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. Gen. Dynamics Corp.*, 25 B.R.B.S. 128, 131 (1991). To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Elliot v. C&P Tel. Co.*, 16 B.R.B.S. 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 B.R.B.S. 339 (1988).

If the claimant makes this *prima facie* showing, the burden shifts to employer to show SAE. *Clophus v. Amoco Prod. Co.*, 21 B.R.B.S. 261 (1988). The employer is not required to act as an employment agency for the claimant; it must, however, prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981).

Claimant argues that "virtually all the medical evidence of record confirms that claimant has been unable to return to his pre-injury employment position as a longshoreman at DRS since January 7, 2000." (Claimant's Brief, p. 15.) In support of this position, Claimant would have me credit Dr. Farber, Ridenour, Chairman and Lee's opinions. Claimant notes that even Dr. Roberts, Employer's expert, stated that Claimant could not return to longshore work absent a work hardening program. Claimant argues that the opinions of these experts outweigh Dr. Korevaar's opinion.

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[4]At the time of the 18 July 2002 hearing, Claimant's counsel represented to me that if Claimant had left foot surgery, he would seek only a TTD award commencing 8 January 2000 and continuing. (Tr. at 7.) If no surgery were performed, I understood that Claimant would seek a permanent total award. (Id.) Given the relief requested in Claimant's brief, I assume that Claimant did have the anticipated surgery and that he is thus seeking a TTD award. I take notice that Dr. Ridenour's 16 December 2002 report alludes to a 16 October 2002 surgery. (JX24.) Moreover, I note that Dr. Chairman testified concerning surgery that took place on 9 September 2002, the day before he gave testimony. (JX33 at 19.)

Employer contends that Dr. Korevaar's opinion should be given controlling weight and that, based on it, Claimant is completely recovered from his original work injury. (Employer's Brief, p. 13.) Employer notes that during Dr. Korevaar's physical examination Claimant did not exhibit signs of pain or an inability to perform normal tasks but rather exhibited maneuvers that require agility. Employer argues that Dr. Korevaar's report is the most comprehensive.

Five of the seven physicians who offered opinions concerning Claimant's ability to return to longshore work opined that he could not. Drs. D'Amore, Farber, Ridenour, and Chairman were unequivocal in their opinions that Claimant was totally disabled from longshore work. (JX28, JX32(a) at 22-23, JX34 at 20-21, JX33 at 18.) While Dr. Lee never stated that Claimant was incapable of longshore work, he did opine that because of a low back condition, residual from the 7 January 2000 accident, Claimant would be disabled from certain activities. (JX21.) Dr. Lee stated that Claimant could, however, do a modified job. (Id.) Based on Dr. Lee's statement that Claimant could do a modified job, I infer that he opined that Claimant could not do his former longshore work. Drs. Korevaar and Levin opined that Claimant was capable of returning to longshore work. (JX22, JX18.)

While I agree with Employer that Dr. Korevaar's report is comprehensive and well-reasoned, I am constrained not to credit her opinion over that of the five other doctors who reached a contrary conclusion. Moreover, I note that Dr. Korevaar and Levin's opinions were reached after a single medical examination. Drs. D'Amore, Farber, Ridenour, and Chairman all had opportunity to examine Claimant on more than one occasion, giving them a far greater familiarity with Claimant's condition. Therefore, I find that Dr. Korevaar and Levin's opinions are outweighed by those of the other five physicians. Accordingly, I find that Claimant has met his burden and made a *prima facie* showing of total disability.

As for SAE, Ms. Salek, Employer's vocational expert, identified and classified the eight positions identified above. (JX27.) Only Drs. Farber and Roberts gave opinions concerning the positions of SAE Ms. Salek identified. Claimant contends that, based on Dr. Farber's opinion, he could perform, at most, sedentary work, making unavailable all but one of the SAE positions.[5] Claimant would have me credit Dr. Farber's opinion, because he is "the physician most familiar with claimant's overall condition in light of his pre and post-injury care of the claimant." (Claimant's Brief, p. 15.) Employer, on the other hand, directs my attention to Dr. Roberts who approved all the jobs Ms. Salek identified. Dr. Farber, Employer contends, appeared to have limited Claimant to sedentary work only because he believed that Claimant will require some accommodations in order to work medium or light duty positions. (Employer's Brief, p. 16.) Employer would have me find that Claimant is capable of performing SAE at a rate of $8.17 per hour, the average hourly wage of all the SAE positions identified by Ms. Salek.

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[5]I note that were I to accept Claimant's position that he is physically capable of only sedantary work, Employer would have failed to demonstrate SAE, because the BRB has held that a showing by an employer of a single job opening is not sufficient to satisfy the employer's burden of SAE. *See Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 B.R.B.S. 154 (1990).

I am persuaded that Claimant is capable of performing SAE. I can find no reasoned basis, however, to credit Dr. Farber's opinion over that of Dr. Roberts. I find that both opinions are well-documented and reasoned. Therefore, I rely on my own observations of Claimant's activities on the surveillance tapes in conjunction with Ms. Salek's descriptions of the SAE positions to delineate the parameters of Claimant's capabilities. I note that the surveillance video shows Claimant standing and walking around the Executive Auto Salon. Moreover, the surveillance evidence establishes that Claimant was doing considerable driving back and forth between his home in New Jersey and the Executive Auto Salon in Philadelphia. Based on this evidence, I find that Claimant is capable of performing all but the medium duty positions identified in Ms. Salek's report.[6] Therefore, I averaged the positions of light and sedentary employment that Ms. Salek identified and obtained a wage earning capacity of $7.26 per hour. Accordingly, I calculate Claimant's compensation rate as follows:

	$844.77 (AWW)
–	$290.40 ($7.26 x 40)
=	$554.37
x	2/3
=	$369.58 per week (Claimant's temporary partial disability ("TPD") award)

2. Claimant's Failure to Execute The LS-200s

Section 8(j) of the LHWCA provides:

> (1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.
>
> (2) An employee who –
>
> > (A) fails to report the employee's earnings under paragraph (1) when requested, or
> > (B) knowingly and willfully omits or understates any part of such earnings,
>
> and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.
>
> (3) Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee in any amount and on such schedule as determined by the deputy commissioner.

[6]I infer from Ms. Salek's description of the light-duty position with Burns-Pinkerton Security that the other light duty positions would involve similar duties.

33 U.S.C. § 908(j).[7] Employer contends that Claimant has forfeited his right to compensation from 7 January 2000 to 22 April 2002 by his failure to comply with Section 8(j)(1). More specifically, Employer asserts that, based on the video surveillance of Claimant, it became suspicious that Claimant was earning wages from Executive Auto Salon. To confirm its suspicion, Employer took the following two prong approach: (1) subpoenaed Executive Auto Salon for Claimant's employment records (JX5); (2) issued three LS-200 Report of Earnings requests (JX8). (Employer's Brief, p. 18.) In a 2 April 2002 letter, Executive Auto Salon attested that it did not employ Claimant (JX6) and Claimant never returned the three LS-200s. Employer argues that because of Claimant's failure to return the forms, he should be subject to the same sanctions under section 8(j)(2)(A) as those who intentionally misstate their earnings, 8(j)(2)(B).

Claimant argues that Section 8(j) sanctions do not apply if an employee does not respond to an LS-200 but do apply if a claimant intentionally misstates his earnings. Claimant argues he did not misstate his earnings, because he did not respond to the LS-200s. Second, Claimant argues, he was not obligated to respond to the LS-200 request for earnings statements, because he was not receiving disability payments from Employer at the times the requests were made. *See Plappert v. Marine Corps Exch.*, 31 B.R.B.S. 13 (1997). Employer stopped paying Claimant benefits on 19 November 2001 (JX4, Tr. at 6) and the LS-200 requests were made on 25 January 2002, 21 February 2002, and 22 April 2002. (JX8.)

Initially, I agree with Employer's construction of Section 8(j). As I read Section 8(j), when an Employer requests a statement of earnings, a Claimant who either fails to report earnings *or* makes an intentional omission or understatement of earnings has violated the section and is subject to sanctions. Therefore, I disagree with Claimant's contention that sanctions apply only when a claimant makes an intentional misstatement. Either a failure to respond or a knowing and willful omission or understatement is enough for sanctions.

For Claimant's second argument, he relies on *Plappert* to support his position that he was not required to respond to the LS-200s, because he was not receiving compensation after 19 November 2001.

In *Plappert*, claimant sustained employment related head, neck, and shoulder injuries in June of 1986. 31 B.R.B.S. at 13-14. Claimant briefly returned to work and then found new employment.

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[7]The implementing regulations are found at 20 C.F.R. §§ 702.285 - 702.286. Section 702.286 (a) provides,

> Any employee who fails to submit the report on earnings from employment or self-employment under § 702.285 or, who knowingly and willingly omits or understates any part of such earnings, shall upon a determination by the district director forfeit all right to compensation with respect to any period during which the employee was required to file such a report.

20 C.F.R. § 702.286(a).

Id. at 14. In 1992, working for the new employer, claimant experienced intensification of her symptoms. *Id.* In January 1993 she underwent surgery and remained out of work until August, 1994. *Id.* She sought TTD from 13 December 1992 to 5 August 1994. *Id.* Before the ALJ, employer argued that "claimant failed to comply with the reporting requirements of Section 7(d)(2), 33 U.S.C. § 907(d)(2), and that she was subject to the Section 8(j), 33 U.S.C. § 908(j) (1988), forfeiture provision because the information she provided on the Report of Earnings Form (LS-200) was inaccurate." *Id.* The ALJ awarded TTD for the requested period and held that "claimant is not subject to the Section 8(j) forfeiture provision because the wages she failed to report were earned prior to the period during which she claims disability, *i.e.*, before December 13, 1992." *Id.*

On appeal, the BRB considered the ALJ and the employer's disagreement over what constitutes the "period during which [claimant] was required to file such report." *Plappert*, 31 B.R.B.S. at 17 (citing § 908(j)(2)). The ALJ found that "subsection (j)(2) applies only to that period of time during which claimant claimed a disability, *i.e.*, December 13, 1992, through August 5, 1994"; the employer argued the "period" was the time during which it requested a reporting. *Id.* Relying on *Denton v. Northrop Corp.*, 21 B.R.B.S. 37 (1988) and the legislative history, the BRB held that the ALJ "reasonably determined that pursuant to Section 8(j), employer may request an earnings report only for earnings during periods of disability, as those would be the only periods during which an employee's earnings could affect employer's liability for compensation." 31 B.R.B.S. at 17.

In the instant case, Claimant contends that because he did not receive compensation after 19 November 2001, Employer's 25 January, 21 February, and 22 April 2002 LS-200 requests did not require responses. However, in the first two LS-200 requests, Employer was seeking Claimant's earning information between 7 January 2000 and 21 January 2002. (JX8.) In the third request it was seeking information on his earnings between 7 January 2000 and 22 April 2002. (Id.) Employer voluntarily commenced TTD payments on 8 January 2000 (Stipulation 12) and terminated the payments on 19 November 2001 (JX4). While Employer did not mail its first LS-200 request to Claimant until 25 January 2002, this is not the decisive factor under *Plappert*. Rather, the decisive factor is whether earnings information is sought for "periods during which an employee's earnings could affect employer's liability for compensation." *Plappert*, 31 B.R.B.S. at 17. Claimant now seeks TTD commencing on 8 January 2000 and continuing. (Claimant's Brief, p. 1, 17.) Employer's LS-200 requests cover periods during which the Claimant's earnings could potentially affect Employer's liability for compensation.[8] Accordingly, I find that Claimant is subject to the Section 8(j)

[8]Based on the record currently before me, there is no evidence (barring the surveillance videos) to suggest that Claimant received any compensation during any of the periods covered in Employer's LS-200 requests. In fact, both Claimant and Executive Auto Salon attested that Claimant was not compensated for his work there. (JX6, Tr. at 38-39.) Notwithstanding this evidence, Claimant admittedly never returned the LS-200 requests. (Claimant's Brief, p. 16.) The BRB has said that once the LS-200 inquiry is made, "the claimant must complete and return the form within 30 days of receipt whether or not [s]he has any post-injury earnings." *Plappert*, 31 B.R.B.S. at 16.

sanctions for failing to return the LS-200s. *See Zepeda v. Nat'l Steel and Shipbuilding Co.*, 24 B.R.B.S. 163, 168 (1991) (recognizing that an ALJ does not abuse his discretion in finding that claimant's violation of the reporting requirements of Section 8(j) should result in forfeiture of benefits).

ATTORNEY'S FEE

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer. Claimant's attorney has not submitted his fee application. Within fourteen days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's counsel who shall then have ten days to comment thereon. The postmark shall determine the timeliness of any filing. I will consider only those legal services rendered after the date of referral to this office. Services performed prior to that date should be submitted to the District Director for his consideration.

ORDER

It is hereby **ORDERED**,

(1) Employer shall pay TPD benefits from 8 January 2000 to the present and continuing;
(2) Employer shall take credit against (1) for all previous payments made to Claimant and for all payments which I hereby order forfeited between 8 January 2000 and 22 April 2002;
(3) Employer shall provide all reasonable and necessary medical expenses under Section
7 of the LHWCA to Claimant;
(4) Employer shall pay Claimant's attorney's fees and costs to be established in a supplemental order.

A

RALPH A. ROMANO
Administrative Law Judge